



POLICE DEPARTMENT

August 4, 2009

MEMORANDUM FOR: Police Commissioner

RE: Sergeant Patrick Kenney
Tax Registry No. 905358
Mounted Unit
Disciplinary Case No. 84562/08

The above-named member of the Department appeared before me on March 19, 2009, and April 20, 2009, charged with the following:

1. Said Sergeant Patrick Kenney, assigned to the Mounted Unit, while off-duty, on or about and between May 7, 2008, and May 8, 2008, in the vicinity of [REDACTED] County, New York, did wrongfully and without just cause engage in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit:; said Sergeant initiated a verbal and physical altercation with Members of the Service known to this Department that escalated into a police incident. (As amended)

PG 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCTS¹

The Department was represented by Penny Bluford-Garrett, Esq., Department Advocate's Office, and the Respondent was represented by Andrew Quinn, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

¹ On the Department's motion and with the Respondent's consent, the specification was amended at the outset of trial to read "on or about *and between May 7, 2008, and May 8, 2008.*" A 911 call, admitted as Department's Exhibit [DX] 1, was recorded on May 7, 2008, at 11:06 p.m.

DECISION

The Respondent is found Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Sergeant Kristin Klimkoski and Police Officer James Klimkoski as witnesses.

Sergeant Kristin Klimkoski

Sergeant Kristin Klimkoski testified that she has worked for the Department for about 12 ½ years and was currently assigned to the Brooklyn North Investigations Unit doing “administrative work.” Her first assignment as a sergeant was to the 83 Precinct, where she worked the day tour.

As a police officer, Kristin was assigned to the 101 Precinct. In approximately October 1998, the Respondent was transferred there, and the two became friendly. Kristin testified that they began dating around June 2000. “A guess a couple of years into it” their relationship became serious, and they got engaged in June 2007. However, Kristin broke off the engagement in January 2008. “I just – I wasn’t happy any longer, so I broke up with him.”

At the time that the engagement was broken off, Kristin testified, she and the Respondent had been living together for approximately three years. Kristin and the Respondent continued to live together while the Respondent was trying to find another place.

The house was in [REDACTED] in [REDACTED] County. It was owned by Kristin’s parents and her brother, Police Officer James Klimkoski. It was an unattached two-floor, two-family house,

with an apartment on the upper level. James lived in the apartment, but their parents lived elsewhere. James's apartment had a separate entrance, as well as a sliding glass door to the house's dining room.

Kristin testified that around March 2008, she and the Respondent "decided to give it another shot" and got back together. Their attempt at reconciliation, however, ended on May 7, 2008. At this time, they were "[v]ery rarely," once a week at most, sleeping in the same bedroom. The Respondent had two children that would come for visitation, and he would usually stay in the same room as them.

Kristin testified that on May 7, 2008, the Respondent was working a 4x12 tour, and she believed she called him "just to talk." During the conversation, some "stupid nonsense about Yankee tickets" came up, and she "got aggravated." Kristin explained that there were "a few other people on the list to go" to the game before her, and she "just felt that it was just one more thing that was happening, that my feelings and I wasn't taken into – he wasn't thinking about me." Kristin "just didn't want to go out with him anymore," told the Respondent "the conversation is over," and hung up the phone.

Kristin testified that the Respondent kept calling, but she did not answer. Finally, she answered, and the Respondent stated that he was taking lost time and coming home. When the Respondent arrived home, he said he wanted to talk, but Kristin said she just wanted to go to bed. The Respondent got into bed with her, but Kristin "kept telling him to leave." Kristin left and went into another bedroom, but the Respondent followed her into that bedroom. Kristin testified that the Respondent "kind of stood in the way of door so he wouldn't let [her] out." He was saying, "no, I want to talk about this tonight," and Kristin was saying that she did not.

Kristin then went upstairs "to wake up my brother to ask him if I can sleep up there." She was upstairs for about 30 seconds.

Kristin stated that when she came downstairs to get bed linens, the Respondent was blocking the way into her bedroom. She "was screaming, you know, keep your hands off me. . . . [a] couple of times." Kristin testified that James heard the "commotion" and came downstairs.

Kristin explained that "[s]omehow," she "ended up in the bedroom," and "at this point," the Respondent would not let her out. James "was trying to, you know, push Pat out of the way so I could get out of the bedroom to go upstairs . . . and it was just a pushing match between the two of them." Neither threw any punches or "tried to raise a fist or a hand toward" the other. There was no kicking, biting, slapping, "flailing of the arms, or anything like that." Words were exchanged between the Respondent and James, but Kristin did not recall what was said. After "a space opened up," James told Kristin to go upstairs, which she did and he followed. James called 911, and Kristin called the Operations Unit as required. The exchange between the two men took under one minute.

Kristin testified that the [REDACTED] County Police Department ([REDACTED] PD) responded to the scene. She and James got off the phone and went downstairs. They exited through James's side entrance, Kristin testified, because "[a]pparently, the sliding glass door was nailed shut." She believed this was done with a drill. The door had not been "nailed" shut before they went upstairs.

Kristin said that [REDACTED] PD officers were present, some talking to the Respondent, and some to Kristin and James. A duty captain called on the phone and she handed it to an officer on scene. Kristin entered the house, and observed that the Respondent had a cut to his eye. She did not know how he received the wound, which he did not have before she went upstairs.

Kristin testified that as of July 2008, the Respondent no longer lived with her. She testified on direct examination that generally, "things are civil between us now," but they were no longer in a "relationship." On cross-examination, she testified that they "continue to try to get together, and sometimes it works, sometimes it doesn't." She admitted that several months later, they went on vacation together, so "up until a couple of months" before the trial, they "continued to try to reconcile."

On cross-examination, Kristin testified that she knew that the Respondent was taking lost time to come home and approximately when he would arrive, and that she did not "feel compelled to leave the house or anything."

Kristin was not sure if, during the time that the Respondent had stated that he wanted to talk, she actually stated "that's it, I am going to leave, I'm going to go upstairs to my brother's place." The Respondent did not strike her, attempt or threaten to do so, or make a "physically menacing gesture" toward her. He did not threaten her with a weapon or make "any comment of that nature." Kristin did not have to push or shove the Respondent to get past him and go upstairs. The argument took no more than a few minutes. The Respondent did not follow her up the stairs or yell up to her.

Kristin admitted that when she came downstairs to get bedding, the Respondent stopped her from entering the bedroom "merely by kind of standing in the doorway." The Respondent again wanted to talk, and Kristin told him that she was tired and wanted to go to bed. Kristin conceded that he was not threatening her or "physically menacing, raising his hands, or doing anything to put [her] in any type of fear or physical harm." She was saying "keep your hands off of me" because "we were just in a situation where, you know, he wanted to talk and I couldn't

move either way." This was when Kristin was trying to squeeze past the Respondent into the bedroom.

Kristin agreed that she was able to get by as the Respondent and James were interacting. She conceded that the Respondent did not follow her and James upstairs.

Kristin described the injuries of the persons involved: "I think the three of us received injuries, but the area is just so small it was inevitable for somebody to hit into a wall, but not from any intentional injuries."

Kristin agreed that after James called 911 and she called Operations, the Respondent remained at the house and spoke to [REDACTED] PD personnel. No personnel from the New York City Police Department came to the house.

Kristin clarified that the sliding glass door was actually drilled shut, with a screw. There was no other way to lock the door from inside the house.

On re-direct examination, Kristin testified that she asked the Respondent "to leave the room" a "few" times. She learned that the Respondent had drilled the door shut because it was drilled in when she came downstairs after [REDACTED] PD arrived, and because James told her that he heard the drill going while she was speaking to Operations.

Police Officer James Klimkoski

Police Officer James Klimkoski had been assigned to the 90 Precinct for his entire career in the Department. He was almost 6'1" tall and weighed about 230 pounds, approximately the same as he was in May 2008.

James testified that he lived at a house in [REDACTED] with his sister Sergeant Kristin Klimkoski and the Respondent. It was set up as a two-family house, and James lived upstairs. He had his own kitchen. James testified that he and his mother owned the house.

On May 7, 2008, between 11:00 p.m. and midnight, while James was upstairs, he heard Kristin's voice. She came upstairs and was crying. Kristin kept telling James "he won't leave me alone, he won't leave me alone." James believed Kristin was referring to the Respondent. Kristin did not say that the Respondent hit her, and she did not have "any injury or any type of physical problem."

James testified that he told Kristin that she could sleep upstairs in his apartment, and to go downstairs and get a pillow and blanket. Kristin went back downstairs.

A minute or two later, James heard Kristin screaming, "Get your hands off me, get your hands off me, get your hands off me." James went downstairs, and observed the Respondent holding onto Kristin's arms with his hands. He was also blocking her path. Kristin was trying to get away but the Respondent was not letting her go. They were in the hallway, about ten feet away from James. The hallway was about three feet wide, "[f]airly narrow and tight." James did not recall if Kristin was holding onto the Respondent. She was not complaining of any pain.

James stated that he tried to separate the Respondent and Kristin, placing one hand on each. The Respondent had one hand on James and one on Kristin, so there "was a bit of pushing, a struggling match going on at that time." Within less than one minute, Kristin broke free.

James testified that he told Kristin to go upstairs, but she "still was standing around." James and the Respondent still had their hands on each other. The Respondent repeatedly yelled "get out my apartment, this is my apartment," and James responded "this is my house." James was sure Kristin was saying something but he could not recall what exactly. There was "a bit of

pushing and shoving between both of us into some walls, on the floor," which lasted less than one minute – "30 seconds tops." No punches were thrown or threatened, and there was no "head butting, hitting, biting, anything like that." After James "got loose," he and Kristin went upstairs.

James asserted that as he went upstairs, he yelled to the Respondent that he was going to call the [REDACTED] PD. The Respondent answered that if James did so, "he was going to hit himself in the head." The Respondent did not follow James upstairs. James "just thought he just said that, you know, for no reason. I didn't take it seriously, and I didn't think anything of it."

After going upstairs, James called 911 (see DX 1, 911 tape). James asserted that after he called 911, he heard the sound of drilling from downstairs.

[REDACTED] PD arrived about five minutes after James called 911. He and Kristin went downstairs. He tried to open the sliding door into the house, but it was "jammed shut." James explained that the door was wooden with glass panels. It was not equipped with a lock.

When James and Kristin exited the house, [REDACTED] PD was speaking to the Respondent at the front door. Those officers told James to "stand back and wait for them to ask me questions."

The [REDACTED] PD officers approached James. They said that the Respondent had a cut on his head, and asked James how the Respondent received the cut. James testified that he did not know how the Respondent received it. [REDACTED] PD prepared a Domestic Incident Report (DIR), but no one was arrested.

James testified that in November 2008, he received two letters in the mail, one addressed to him and one to his mother. At the time, James's mother was living at the [REDACTED] location with him and his aunt. Kristin had moved out. James was "le[d] to believe" that his letter was

from the Respondent because “[i]t was an apology letter.” James asserted that he threw his letter in the garbage because after reading it, he “was disgusted by it.”

The letter to James’s mother, [REDACTED], was admitted as DX 2. It is undated, but the envelope is postmarked November 11, 2008. It reads verbatim as follows:

Dear [REDACTED],

Im sorry for all the problems that I caused you and your family. I know as a mother you don’t want to see you daughter upset and hurting, although it wasn’t intentional, my actions were selfish and uncalled for. Krissy was one of the best things that ever came into my life. I truely loved her and never wanted to lose her. I have know one to blame but myself. I never expect you to forgive me but I am sorry for what happen.

Sincerely

Pat

On cross-examination, James admitted that when he sent Kristin to go downstairs to get bed linens, he had no “concerns there could be potential physical threat” to her or that “anything would have occurred.”

James conceded that Kristin was not complaining of any pain when he came downstairs and saw her. According to James, Kristin was closer to the stairs leading to the second-floor apartment than was the Respondent. James was facing the Respondent; Kristin had her back toward James. James agreed that he touched the Respondent before the Respondent touched him. James conceded that when he let go of the Respondent, the Respondent did not try to “regrab,” push or punch him.

The Respondent’s Case

The Respondent testified on his own behalf.

The Respondent

The Respondent had been a member of the Department for sixteen years and a sergeant for eleven. He had been assigned to the Mounted Unit for almost two years. He was about 6 feet tall and in May 2008 weighed between 225 and 235 pounds.

The Respondent testified that he had worked with Kristin for ten years. They were "in a relationship" for seven or eight years. They got engaged on June 14, 2007, but broke it off in January 2008.

On May 8, 2008, the Respondent lived with Kristin and James in a house in [REDACTED]. The Respondent lived downstairs with Kristin, and James lived upstairs. An interior sliding "pocket" door led from the downstairs section to the upstairs section. It was not equipped with a lock.

On May 8, 2008, the Respondent arrived home from work about 10:00 or 11:00 p.m. Kristin was home. They had spoken on the phone and had been arguing earlier that night. Kristin was upset because they did not spend enough time together. The Respondent decided to take lost time. When he spoke to Kristin again on the phone, she wanted to make weekend plans, but he had Yankee tickets, and Kristin got very upset and began arguing with him. This was about 11:00 to 11:30 p.m.

The Respondent wanted to talk to Kristin "and just get it over with because we've had arguments in the past, and it's better to talk it out." The prior arguments never led to "any type of physical confrontation or physical encounter or contact."

The Respondent testified that Kristin did not go upstairs until after James came downstairs. The Respondent said that he was "discussing then arguing" with Kristin for as much as ten to fifteen minutes. He also stated that it was a "couple of minutes" before "it turned into

sort of . . . a shouting match.” There was no physical contact between him and Kristin, and there were no threats of physical violence.

The Respondent agreed that Kristin tried to leave the bedroom. He was standing in the doorway, attempting to speak to her. Down the hallway, through the dining room, was the staircase to James’s apartment.

The Respondent testified that as he was facing Kristin, James came up behind him and pushed him out of the way. James told Kristin, “let’s go upstairs. This is enough. Let’s go.” Kristin was in the bathroom at this time, and the Respondent was in the doorway. The Respondent testified that he told James “get out of my apartment,” and began pushing him out of “my apartment.” They were pushing and shoving each other in the hallway, leading to the Respondent getting knocked into the wall. Neither of the men threw any punches at each other. The Respondent admitted that he may have made physical contact with Kristin unintentionally “when she was trying to go upstairs or whatever. . . . She was there, you know, in between I guess me and him.”

The Respondent testified that the altercation with James lasted “[n]ot even a minute. It was a couple of seconds.” There was a “push, push, and you know, they went upstairs.” The Respondent did not go upstairs or threaten to do so. He admitted that he followed James and Kristin to the door “and yes, I put a screw in the door to lock the door.” He did this “so he couldn’t come back into my apartment.” Because there was an exit from the house itself from the upstairs apartment, “he can go where he wanted to go, but he wasn’t coming back in my apartment.” The Respondent’s drill was kept in the front hallway.

The Respondent stated that at no point during that night did he “threaten to punch, or kick, or strike” Kristin. Nor did he “either verbally or through action threaten to strike, or punch, or kick” James.

The Respondent testified that as James was walking away, he told the Respondent that he was calling 911. The Respondent replied, “I will be here waiting for them.” He denied saying, “I’m going to hit myself in the head” or anything of the sort. The Respondent remained at the house and [REDACTED] PD arrived about five minutes later. They came to “my front door” and asked what was going on. The Respondent told them what happened. The Respondent testified that James tried to come in, and the [REDACTED] PD officers told him to stay outside. No one was arrested, but a DIR was taken.

The Respondent testified that he received a small cut over his right eyebrow. He did not realize it until [REDACTED] PD pointed it out. He received this “[p]robably being pushed,” and he believed it was during “the first incident” when he was standing in the door frame. It was “a little trickle of blood” and not a “serious cut.” It did not require medical treatment.

The Respondent admitted that he sent a letter to Kristin’s mother in approximately November 2008 (DX 2). He had been engaged to Kristin and had been dating her for about seven years. The Respondent testified that he sent the letter to tell her mother “that I love Krissie and I’m sorry that we are not getting married anymore.” That was what he meant, he asserted, when he wrote that he did not expect forgiveness but was sorry for what had happened. He did not “accept responsibility for the actions of May 8, 2008,” and that was not his intent in sending the letter. The Respondent testified that he just wanted “to say I am sorry it didn’t work out between me and her daughter.”

On cross-examination, the Respondent stated that he lived in the house during the time that the engagement was broken off. In terms of the bedroom arrangement between him and Kristin, "It would go from week to week where we wouldn't be together, then we would be back together. . . . [S]ometimes I wouldn't sleep in the bedroom and sometimes I would sleep in that bedroom."

The Respondent claimed that he wanted to speak to Kristin "about what was going on with the argument that she started." They talked, but she wanted to go to sleep. The Respondent wanted to keep talking and "get it over with." They began arguing about whether to keep talking about their issues. Their argument "was loud enough for the brother to hear upstairs."

The Respondent did not believe Kristin said "get your hands off me." He stated that "[p]robably, yes," Kristin was trying to get out of the bedroom while he was standing in the doorway. He was standing in the doorway "[b]ecause I was talking to Krissie." That was "where I wound up I guess when I walked in."

At one point that evening, the Respondent testified, Kristin might have said "that she wanted to "break off the relationship with" the Respondent "officially." The Respondent agreed that he was "pretty upset" as a result of the incident.

The Respondent explained that the "problems" he had mentioned in the letter was a reference to the fact that a lot of money had been spent on the planned marriage, and Kristin's family had helped with the costs. His statement that he realized Kristin's mother did not want to see her daughter upset and hurting was a reference to the fact that he had "talked to Krissie since then," and she was "still upset that we are still not together. She calls me all the time." The Respondent asserted that he and Kristin "have been back and forth since" November 2008.

The Respondent also explained his remark that his actions had been selfish and uncalled-for, though unintentional. He stated that he had two children (there was joint custody; the children's mother had residential custody), and he would occasionally "neglect" Kristin "as far as going to things. . . . [I]f my kids needed something, I left Krissie. If we were going out somewhere and something happened to my kids, I would run to my kids."

The Respondent conceded that the [REDACTED] house was not "in [his] name." He said he had considered "nailing" the door closed in the past. The Respondent testified that James would use the washer and dryer "in our apartment," but would also take their leftover food, which the Respondent had planned to eat. The Respondent asserted that Kristin spoke to James about this issue. The Respondent added that he and Kristin paid rent "for the apartment for me and her to live in, not him to come in. And he has been in my house so many times when he didn't belong. This time I said I'm locking it. I don't need it anymore." The Respondent explained that he paid his portion of rent to Kristin.

FINDINGS AND ANALYSIS

The Respondent is charged with conduct prejudicial to the Department by initiating an off-duty "verbal and physical altercation" with two other members of the service, his girlfriend Sergeant Kristin Klimkoski and her brother Police Officer James Klimkoski, and that this "escalated into a police incident." The Department's theory, in a nutshell, was outlined in the opening statement: "Sergeant Patrick Kenney initiated a verbal dispute with Sergeant Klimkoski and attempted to prevent her from entering a room by blocking a door causing her to yell for her brother that lived with her and Sergeant Kenney." According to the Department, James "came to his sister's defense," and the Respondent and James began pushing and shoving each other. This

led the Klimkoskis to call the local police department ([REDACTED]) and notify this Department.

The evidence revealed that the incident took place in an overall context of domestic tension. All three members lived in the same house in [REDACTED] which was owned by James and the parents of Kristin and James. The Respondent and Kristin lived downstairs and James lived upstairs. The Respondent paid rent to live there.

Although the house was described as having two "apartments," the downstairs living space was connected to the staircase by a sliding glass-panel door. It was obvious that there was tension between James and the Respondent specifically. The Respondent testified that there had been issues relating to James coming downstairs and eating food from the refrigerator belonging to the Respondent and Kristin. The Respondent testified that when he and James were wrestling with each other in the hallway, he said to James, "get out of my apartment," and "started pushing him out of my apartment." In a parallel statement, James remarked to the 911 operator (see DX 1, tape), "It's my house, you know?" After James and Kristin went upstairs, the Respondent was so upset at that moment that he drilled the sliding door shut so that James could not walk directly from his quarters to the downstairs.

Moreover, the relationship between the Respondent and Kristin can be characterized as on-again, off-again. There was an engagement in June 2007, which broke off the next January. The Respondent still continued to live in the house after the engagement had ended. During 2008, sometimes they were back together and sometimes not. The difficulty was illustrated during the 911 call, when James referred to the Respondent as "the boyfriend, whatever, or ex-boyfriend, whatever." Often in his testimony, the Respondent referred to James only as "the brother." It was clear, therefore, that the two men did not get along very well.

All three members testified about the incident. Their accounts both conformed with and differed from each other in various ways. Kristin testified that she and the Respondent had been arguing over the phone. When the Respondent came home, he wanted to keep talking, but Kristin wanted to go to sleep and asked him more than once to leave the room. The Respondent followed her into another bedroom, at which point she went to James's apartment to ask if she could sleep up there. When she went downstairs to get bedding, the Respondent blocked her way into the bedroom (Kristin did not actually testify that the bedding materials were in the bedroom). He again said he wanted to talk, but Kristin said she was tired and wanted to go to sleep. Kristin yelled for the Respondent to get his hands off her – she testified that she did so because they were “just in a situation where, you know, he wanted to talk and I couldn't move either way.”

James testified that he heard Kristin's voice from downstairs, and that when she came upstairs she was crying. She said, “he won't leave me alone.” James told Kristin that she could sleep upstairs and she went back down to get bed linens. In concordance with Kristin's testimony, James stated that minutes later he heard Kristin scream “get your hands off me,” and he came downstairs.

The Respondent testified that he and Kristin had argued earlier over the phone and started up again when he came home. He stated that at one point, Kristin wanted to go to bed but he wanted to “get it over with.” This argument, the Respondent said, was loud enough for James to hear, and he came downstairs.

On direct examination, the Respondent was asked about the timing of the initial argument:

Q: How long were you at first discussing then arguing with Kristin before her brother arrived?

A: Could have been 10 could have been 15 minutes. I am not exactly sure.

Q: And how long were you talking to Kristin before it turned into sort of, as you described, a shouting match?

A: A couple of minutes.

The timing is significant because Kristin testified that when the Respondent came home, he wanted to talk but she wanted to go to sleep. He got into bed with her, and she got out, but he followed her into another bedroom. It was at this point, Kristin testified, that she went upstairs and told James that the Respondent was bothering her. While the Respondent testified that she did not go upstairs first, by his own testimony he began a verbal argument that Kristin did not want to have, and continued it for fifteen minutes, most of which was yelling, loud enough for James to hear upstairs. The Court finds, therefore, that the Respondent instigated the verbal part of the argument.

Kristin testified that after she had gone into the second bedroom to sleep and the Respondent followed her in, she tried to leave and go upstairs. Instead, the Respondent blocked her path "so he wouldn't let [her] out." Eventually, she was able to get by without pushing or shoving him. When she came back downstairs, after crying to James that the Respondent was bothering her, she "couldn't get into" her bedroom because the Respondent "was just blocking the door to where I couldn't come in." She began screaming, several times, "keep your hands off me." Kristin conceded that the Respondent did not grab her; she yelled this because "we were just in a situation where, you know, he wanted to talk and I couldn't move either way." She was trying to squeeze past him into the bedroom. At the same time, the Respondent was saying "I want to talk about this, we need to talk about this." Kristin responded that "we are not going to talk about it tonight, I'm tired, I just want to go to bed."

The Respondent testified that Kristin did not first go upstairs to get bedding. He admitted, however, that she was trying to leave their bedroom and he was "standing in the

doorway trying to talk to her.” He denied any physical contact with her. He answered “Probably yes” to the question of whether Kristin was trying to get out of the bedroom while he was standing in the doorway.

Kristin testified that when James came downstairs, she somehow got inside the bedroom but the Respondent would not let her out. James “was trying to, you know, push Pat out of the way.” James testified that the Respondent was physically holding onto Kristin as she was trying to get away. James said that the Respondent and Kristin were in the hallway, not the bedroom, but agreed that the Respondent was blocking her way. James “tried to separate them” by placing a hand on each. This led to “a bit of pushing, a struggling match.” The Respondent testified that he was “basically looking at Kristin that way” when James “came up behind me and just pushed me out of the way,” telling his sister “let’s go upstairs. This is enough. Let’s go.” This led to the Respondent and James pushing and shoving each other. The Respondent said that he might have had “physical contact” with Kristin “[p]ossibly when we were in the hallway when she was trying to go upstairs or whatever.”

The Court finds that the Respondent is responsible for the escalation of the argument into a physical confrontation involving all three participants, which led to James’s 911 call and the arrival of [REDACTED] PD. Certainly it is not a disciplinary violation for a member to have a verbal argument with a domestic partner, even one that becomes loud. See Disciplinary Case No. 82572/07 (a member’s verbal dispute with spouse, significant other or friend is not per se conduct prejudicial to the Department).

Here, however, the Respondent went beyond simply having an argument with his girlfriend. He kept haranguing Kristin when she made clear to him that she wanted to go to bed. Beyond that, he physically blocked her from leaving the room. This physical blocking was

completely inappropriate; Kristin had every right to leave the room and go to sleep without physical interference from the Respondent. By blocking Kristin, the Respondent created a physical confrontation regardless of whether he actually grabbed her arms. See Disciplinary Case No. 82276/06 (respondent found guilty of grabbing a cell phone from wife's hand and yelling obscenities at her).

Moreover, the Respondent's act led directly to the pushing and shoving that followed. As noted, there was palpable friction within the household among the three residents to begin with. Further, Kristin testified that the Respondent's blocking of her, after she had come downstairs to get bed linens, led her to yell, "get your hands off me." James testified that he came downstairs in response to the yelling, and after Kristin had first come up to him, crying, and saying that the Respondent would not leave her alone. The Court credits these accounts, as opposed to the Respondent's testimony in which James just came downstairs and pushed him out of the way, but without Kristin saying "get your hands off me." Although all three witnesses indicated that the yelling was loud enough for James to hear, he had no direct cause to come downstairs and push past the Respondent to get his sister unless he thought she was in trouble.

Further, the initial physical contact by James consisted of pushing the Respondent out of the way to get to his sister so that he could take her upstairs with him. Nonetheless, the Respondent's counsel explored at length the fact that no punches were thrown or attempted. While the Court does not condone James's pushing of the Respondent, the Respondent's pushing of James in return was not an action in self-defense. Rather, it just escalated the altercation into more pushing and shoving to the extent that James called 911 and Kristin called the Operations Unit. Cf. Department of Correction v. Evans, OATH No. 93-464 (evidence did not support

conclusion that respondent hit or poked co-worker in the eye in response to assault, but that respondent “acted defensively to push him off.”).

In conclusion, the Court finds the Respondent responsible for escalating a verbal argument into a physical standoff which led to him pushing and shoving a fellow off-duty member, and to the police being called to the residence. As such, the Respondent’s conduct was contrary to the good order, efficiency and discipline of the Department, and he is found Guilty as charged.

PENALTY

In order to determine an appropriate penalty, the Respondent’s service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222, 240 (1974). The Respondent was appointed to the Department on September 1, 1993. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

The Respondent has been found Guilty of initiating a verbal and physical altercation which led to a police incident. The Department recommended a penalty of 20 vacation days. Counsel for the Respondent argued that there were cases in which member “have bar fights and commit assaults and don’t get 20 days. We’ve had serious cases of domestic violence that don’t get 20 days.”

The Court rejects counsel’s argument. Cases similar to the one at bar have resulted in penalties of 20 days. See, e.g., Disciplinary Case No. 84628/08, approved May 26, 2009 (20 vacation days for engaging in physical altercation with ex-wife; member and ex-wife slapped each other on the face, and member threw his ex-wife onto couch); Disciplinary Case No.

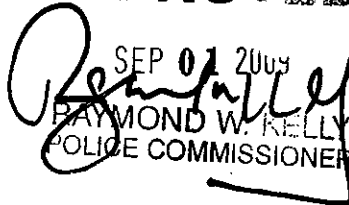
74885/99, approved Jan. 3, 2000 (member forfeited 20 vacation days and agreed to cooperate with counseling; he returned home after drinking several beers and started verbal dispute with his wife, and when she tried to leave, he slapped her and pushed her onto bed). The Court is mindful that there was no assault or physical injury here, but the Respondent's actions were completely unnecessary. In light of the Respondent's work history, see Confidential Mem., infra, the Court recommends a penalty of the forfeiture of 20 vacation days.

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner - Trials

APPROVED



SEP 01 2009
RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER PATRICK KENNEY
TAX REGISTRY NO. 905358
DISCIPLINARY CASE NO. 84562/08

In 2006 and 2008, the Respondent received an overall rating of 4.0 “Highly Competent” on his annual performance evaluation. In 2005, he received an overall rating of 4.5 “Extremely Competent/Highly Competent.” He has received five medals: two for Excellent Police Duty, one for Meritorious Police Duty, one for Exceptional Merit, and one Commendation. During the course of his 16-year career, he has [REDACTED]

The Respondent has no prior formal disciplinary history, but he did receive a Command Discipline and forfeit five vacation days for failing to safeguard information that he received from his girlfriend (another member of the service) regarding a license plate inquiry that the girlfriend had conducted on a Department computer. The Respondent allowed his brother access to the information.

For your consideration.



David S. Weisel
Assistant Deputy Commissioner – Trials